2001

Dennis R. Coburn v. Givan Ford Sales, Inc and Craig D. Kempton : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

DENNIS R. COBURN,
Plaintiff-Respondent,

vs.

GIVAN FORD SALES, INC.,
Defendant-Appellant,

and

CRAIG D. KEMPTON,
Defendant.

Case No. 13353

BRIEF OF APPELLANT

Appeal from Judgment of the Fourth Judicial District
Court in and for Utah County
Honorable Allen B. Sorensen, District Judge

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TABLE OF CONTENTS

UTAH RULES

CASES CITED

TABLE OF CONTENTS (Continued)

AUTHORITIES CITED

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STATEMENT OF THE NATURE OF THE CASE

Givan Ford, Inc., appeals from a jury verdict finding it liable as principal for the tortious conduct of Craig Kempton.

DISPOSITION IN THE LOWER COURT

Following the return of jury verdict, the Honorable Allen B. Sorensen of the District Court in and for Utah County entered a judgment in the amount of $22,000 against defendant Givan Ford, Inc. The motions made by Givan Ford, Inc., for dismissal, for judgment notwithstanding the verdict, and for a new trial were denied.

RELIEF SOUGHT ON APPEAL

Appellant requests that the verdict and judgment against it be set aside and a judgment of no cause of action be entered as a matter of law. Alternatively, it requests that the case be remitted to the District Court of Utah County for a new trial.

STATEMENT OF FACTS

On December 4, 1970, at the intersection of Fifth South and University Avenue in Provo, Utah, a Sunbeam sports car driven by Craig Kempton was involved in a collision with an automobile driven by Dennis Coburn. (R. 5, 126). The Sunbeam was owned by the appellant, Givan Ford, Inc., who employed Mr. Kempton as a lot boy. (R. 130, 215). As an employee of Givan Ford, Mr. Kempton had various duties including: starting the cars regularly, keeping them clean, changing antifreeze, checking batteries, and running errands on the directions of his supervisors. (R. 45, 49, 215, 216, 228). He had no training or experience as a mechanic and had no responsibility for repairing automobiles. (R. 50).

It was uncontradicted that Mr. Kempton was not qualified nor authorized to test drive the cars (R. 130-31), that he did not work under the direction of the salesmen (R. 131), and that any familiarity with the cars came through taking them on errands and starting them each morning (R. 46, 47, 107).

Mr. Kempton had an agreement with some of the salesmen that if he brought customers to them, he would receive a finder's fee out of the salesmen's commissions. It was uncontracted that this was an entirely private agreement between Mr. Kempton and the salesmen, that Givan Ford, Inc., was in now way involved, and that Kempton himself had no duties as a salesman. (R. 106, 107, 134, 135, 230, 233).

At the time of the accident Mr. Kempton was not engaged in performing any of his duties, and had not been given instructions or permission to take the car, but was driving the Sunbeam to satisfy his curiosity about the car and because he was interested in purchasing it for conversion into a dune buggy. (R. 132, 133, 135, 215, 217).

ARGUMENT

POINT I.

THE ONLY EVIDENCE OF LIABILITY ON THE PART OF GIVAN FORD WAS INCOMPETENT AND IMPROPERLY ADMITTED.

Plaintiff's case against appellant was based solely on *respondeat superior* and he had the burden to prove that at the time of the accident, Mr. Kempton was acting within the scope of his employment. *Saltas v. Affleck,* 99 Utah 65, 102 P.2d 493 (1940).

For an employee to be acting within the scope of his employment, he must be doing acts which further the employer's business and which are reasonably incidental to his employment.

In *Carter v. Bessey,* 97 Utah 427, 93 P.2d 490, 493 (1939), the Court stated:

> "The question in every case is whether the act he was doing was one in prosecution of his master's business and not whether it was done in accordance with the master's instructions."

Lewis v. Mammoth Mining Co., 33 Utah 273, 93 Pac. 732, 733 (1908), states:

> "The important question is not whether they acted in accordance with the instructions given them by the defendant, but were they at the time of the commission of the alleged negligent acts performing a service for the defendant in furtherance of its business."

In its opinion in *Burton v. LaDuke,* 61 Utah 78, 210 Pac. 978, 981 (1922), the Court said:

> "These cases support the doctrine that before the master may be rightfully charged with the negligence of his servant, ordinarily it must be shown that the servant was engaged in prosecuting the master's business."

In the present case, the evidence clearly established that at the time of the accident Mr. Kempton was doing nothing in furtherance of his employer's business or which was reasonably incidental to his employment.

All direct testimony was contrary to plaintiff's position. The evidence established that Mr. Kempton was only authorized to take cars from the lot in one of the following following circumstances: (1) the antifreeze in a car needed to be changed, in which case he was authorized only to drive the car across the street, (2)

to drive to the corner gasoline station for tire repair, or (3) upon express instruction, to take a car on an errand. Mr. Kempton admitted that he was to take instructions only from Ernest Earl, Ed or Larry Givan or Dennis Davis. (R. 131). Both Mr. Earl and Mr. Kempton testified in detail concerning the work order system for picking up or delivering parts and it was without contradiction that no such errand was being performed when this accident occurred. Mr. Kempton testified that he did not take the car as part of his employment, but drove the Sunbeam as a prospective purchaser, interested in using the chassis and running gear to construct a dune buggy. (R. 132, 133, 135, 215, 217).

Unable to adduce any helpful testimony, plaintiff's counsel read into the record, over objection, portions of Mr. Kempton's deposition taken July 2, 1971:

> Q. (By Mr. Jeffs) Now if you will follow me on page 31, I asked you which salesman asked you about the condition of the specific cars on the lot, and you answered: "All of them would. If I was around there they would say, they would have a customer and they would yell, 'What kind of shape is this car in?' I would say, you know, I would tell them pretty well. Dennie liked to know just exactly. He didn't like to take the customer. He would say, 'Does this car run good? Does it eat oil or do this?' And I would tell him." (R. 52 and 53).

Later on in the trial, the same question arose again.

> THE COURT: Rule 32(a)(2) says the deposition of a party may be used by an adverse party for any purpose.

MR. CLEGG: In this case, your Honor, it's our position, and has been, that this witness is not adverse to the plaintiff on this issue. He's adverse to this defendant.

MR. JEFFS: Your Honor, I don't suppose it could have been demonstrated more clearly how adverse he is than what happened yesterday.

THE COURT: You called him under Rule 41, 42, whichever one it is, as regards the plaintiff.

MR. JEFFS: As an adverse witness.

THE COURT: Can you call him for that purpose as regards the other defendant?

MR. JEFFS: I think so, your Honor.

THE COURT: Let me read two (Rule 32 (a)(2)) again. You will see what is bothering me. The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership, association or governmental agency which is a party may be used by an adverse party for any purpose.

Now you are not claiming he was a director, managing agent or officer, are you?

MR. JEFFS: No. I do claim he's adverse to us, and I do claim that—I may expand on this question of impeachment. I am trying to use this for impeachment, yes, that, because of the answers he gave me which were not the same as this one the other day, and so that there is a twofold reason: Not only that he's adverse and I want to be able to use his deposition for any purposes, but the other one is for impeaching what he was saying to us.

THE COURT: If this were a two party lawsuit there would be no question, would there?

MR. JEFFS: That is right. I think the rule applies whether it's two party or not. I have the same problem in trying to show what the truth is.

THE COURT: Let me see the deposition, young man. Where are we? * * * (R. 118-19).

THE COURT: What is the basis of your objection?

MR. CLEGG: At least two, Your Honor. First of all that the deposition is not being used for impeachment, but to put on affirmative testimony, and the basis for taking the deposition in a discovery case is much broader than that, so one should not be able to make a record one place and superimpose it to the court's stenographer at this point.

THE COURT: I agree with you on that.

MR. CLEGG: Secondly, it's being elicited in leading form as against a witness who is not adverse to the plaintiff on the issue that the plaintiff on the issue that the plaintiff is now developing, but is adverse to this defendant, Givan Ford Company.

MR. JEFFS: If I may respond to that, Your Honor.

THE COURT: If your objection was on the grounds it's repetitious I might take a closer look at it.

MR. CLEGG: I will be glad to raise that objection, your Honor.

THE COURT: He's already testified to this, hasn't he?

MR. JEFFS: That is right. He did not give this answer. * * *

THE COURT: Did he tell you what your responsibilities were?

MR. JEFFS: I have asked him just now, but we have not had him answer that previously. (R. 119, 120).

* * *

THE COURT: I am going to let him answer that question. I am going to let you ask him again about his answers on page 32. I suspect the objection may be well taken.

THE COURT: Proceed, Mr. Jeffs.

MR. JEFFS: Thank you, Your Honor.

Q. (By Mr. Jeffs) Now, Mr. Kempton, we were talking about what Ernie Earl told you your responsibilities were, and in your deposition you said: "All he told me was that I was supposed to keep the cars running pretty good and then he just gave me a few things to do. He said, 'We will keep you busy. You come and ask me what to do, and I will keep you going for a few days, and from then on you are on your own.' He said, 'You will know what to do by then.' " (R. 122).

This use of Mr. Kempton's deposition was improper. By plaintiff's counsel's own admissions, it was used as independent evidence to establish the liability of Givan Ford (R. 120, 121). This is clearly demonstrated from the record.

THE COURT: Well, the scope of the employment—what are you offering this for? I thought this was already in evidence. He's already testified to the same thing on page 32.

> MR. JEFFS: I don't think he's testified to the fact that Ernie Earl told him to keep the automobiles in good condition and running condition, and that is what I am offering it for. In other words, that his direct supervisor instructed him that was part of his job." (R. 121-122).

Counsel for plaintiff offered the deposition testimony to imply: (1) that Mr. Kempton had duties as a test driver or mechanic in keeping the cars running; and (2) that somehow through the private agreements between Mr. Kempton and various salesmen, he had acquired the implied authority to disregard the instructions of his supervisor and take cars off the lot on his own volition.

This evidence would not have been admissible if directly elicited. The questions were not cast to impeach but were cast to superimpose discovery evidence (necessarily broad) upon a jury trial. Defendant Givan Ford contended and contends that this is an abuse of the deposition process and is in derogation of the discovery rules, and the phrase "by an adverse party for any purpose" is necessarily limited to parties adverse on the issue developed.

Rule 32(a), Utah Rules of Civil Procedure, provides:

> "(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.
>
> "(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent . . . of a public

> or private corporation, partnership or association or governmental agency which is a party may be used by an *adverse* party for any purpose.

The Court ruled that Mr. Kempton was not an officer, director or managing agent of defendant Givan Ford, Inc., but ruled that, since he is a named party to the lawsuit, his deposition testimony could be used "for any purpose." Defendant Givan Ford contends that, on the issue of vicarious liability, Mr. Kempton and the plaintiff were not adverse to each other but the testimony elicited was offered solely against, and was adverse only to, defendant Givan Ford.

Rule 32(a), Federal Rules of Civil Procedure, is identical to the Utah rule. Concerning this Rule, a noted authority states:

> *"The deposition of a party* may be used for any purpose only by an *adverse party;* and the deposition of a party may not be used by anyone other than an adverse party for any purpose except impeachment of the testimony of the deponent as a witness as provided in Rule 32(a)(1), unless the Court finds the existence of one of the conditions enumerated in Rule 32(a)(3). *'Adverse party' as used in this Rule is a term of art, and means a party whose interest in the case is adverse to that of another party, even though they may be both nominally aligned as co-parties."* 4 A *Moore, Federal Practice* (2d Ed.) 32-16 and 32-17.

As pointed out by this authority, the fact that parties are named opposite each other in the pleadings does not necessarily mean that they are adverse parties as to all of the issues raised in the suit. It is well estab-

lished that parties may be adverse on some issues but not on others. In *Skornia v. Highway Pavers, Inc.,* 34 Wis. 2d 160, 148 N.W.2d 678, 681 (1967), the Wisconsin Supreme Court interpreted an adverse party statute as follows:

> "The test of who is an adverse party within the meaning of sec. 885.14(1), Stats., is not determined by whether the person is designated a plaintiff or a defendant in the pleadings or whether he is adverse or not on other issues. In the early case of *O'Day v. Meyers* (1911), 147 Wis. 549, 133 N.W. 605, in discussing the problem of adverse party under sec. 4068, Stats., we stated the true test was 'Are their interests adverse?' citing *Crowns v. Forest Land Co.* (1898), 99 Wis. 103, 74 N.W. 546. Parties to suit may be adverse on one issue and not adverse on another, and thus the right to call a party as an adverse witness depends upon whether the interests of the witness and the party seeking to call him for examination are adverse on the subject matter of the examination."

In *Bauman v. Woodfield,* 244 Md. 207, 223 A.2d 364, 370, (1967), the Maryland Supreme Court stated:

> "Rule 413a2 states, in essence, that at the trial or upon the hearing of a motion, any part or all of a deposition of a party, so far as admissible under the rules of evidence, may be used *by an adverse party for any purpose.* 'Adverse party' as used in this rule means a party to an action on the *opposite* side of an issue raised by the pleadings." (Emphasis added.)

The Utah Supreme Court interpreted the term "adverse party" in connection with a dead man's statute in *Maxfield v. Sainsbury,* 110 Utah 280, 172 P.2d 122 (1946).

In its opinion the Court pointed out that in order to determine who is an adverse party, it is necessary to look past the caption on the pleadings and determine what the parties' interests actually are in connection with the issue in question.

Skok v. Glendale, 3 Ariz. App. 254, 413 P.2d 585 (1966) involved a similar issue: whether the deposition testimony could be used by one party against another when the deponent, also a party, was not "adverse" to the first on the issue in question. The Court there said:

> "We are called upon to determine whether a deposition taken of an adverse party prior to trial is admissible under Rule 26 (d)(2), Rules of Civil Procedure, 16 A.R.S., where, prior to trial, the said adverse party by reason of an adjudication and discharge in bankruptcy no longer has a financial interest or possible liability in the lawsuit.
>
> * * * "In attempting to show the authority of William Barclay to act for and on behalf of the co-tenants in negotiating and signing the contract in question with the City of Glendale, the plaintiff, City of Glendale, relied primarily upon the deposition of William Barclay concerning the existence of a letter which allegedly authorized the said William Barclay to enter into and sign said contract for and on behalf of the co-tenants."

At trial, the plaintiff cited a statute identical to Rule 32 of the Utah Rules of Civil Procedure and used the following argument to convince the trial court to allow its use of the co-defendant's deposition.

"The plaintiff, City of Glendale, in offering the deposition in evidence recited Rule 26(d)(2), and stated as follows:

> "So I think, of course, Mr. William Barclay was a party and we are entitled to use this deposition. We are an adverse party. He is a defendant and as the plaintiff we are entitled to use this deposition for any purpose. Of course, the purpose in using this is not only against Mr. Barclay but also against all the defendants."

Reversing the trial court's decision, the appellate court said:

> "In order for William Barclay's deposition to be admissible 'for any purpose,' under this rule (26(d)(2)), Barclay must not only be a party in the action, but the 'party' introducing the deposition must be adverse to Barclay's position in the suit; *Young v. Liddington,* 50 Wash. 2d 78, 309 P.2d 761 (1967). At the time the deposition was offered in evidence, Barclay was neither interested nor adverse to the position of the plaintiff:
>
> * * *
>
> "We are aware that the deposition discovery rules should be accorded a broad and liberal treatment. *O'Donnell v. Breuninger,* D.C., 9 F.R.D. 245 (1949). But the right to take a deposition does not give the party the right to introduce the deposition in evidence without following the rules of Civil Procedure and Evidence. This is all the more true when, by use of depositions, the right of cross-examination may be restricted and the hearsay rule emasculated.
>
> " 'This is a deposition offered by an 'adverse party' in pursuant of Rule 26(d)(2) but as to the appellee, the deponent Brand is an ordinary wit-

> ness. The statements excluded are thus in no sense admissions against interest of a party.' " *Finn v. J. H. Rose Truck Lines,* 1 Ariz. App. 27 at 33, 398 P.2d 935 at 941 (1965)

The Court thus ruled:

> "Further, it is generally agreed that, under the facts in this case, while a deposition may be admitted against an adverse party, it may not be used against co-parties."

The foregoing authorities make it clear that the admission of Mr. Kempton's deposition as evidence against Givan Ford was improper, as the plaintiff and Mr. Kempton were not adverse parties on the question for which the deposition was used, scope of employment.

The admission of portions of Mr. Kempton's deposition as evidence against Givan Ford under Rule 32 was improper for yet another reason. Use of depositions under Rule 32(a) is qualified by the phrase, "so far as admissible under the rules of evidence."

It is well established that a deposition is an admission of the party giving it and that the admissions of a defendant are not admissible as evidence against a co-defendant. 5 Wigmore, Evidence (3d ed) sec. 1416 p. 194 and 4 Wigmore, Evidence (3d ed.) sec. 1076, p. 116.

4 Wigmore, supra, states:

> "It follows that the statements of one who is confessedly a distinct person B do not become receivable as admissions against A merely because B is also a party. In other words, the *ad-*

missions of one co-plaintiff or co-defendant are not receivable against another, merely by virtue of his position as a co-party in the litigation."

See also *People v. One* 1950 *Mercury Sedan,* 116 C.A. 2d 746, 254 P.2d 66, (1953), *Hyatt v. Johnson,* 204 Or. 469, 284 P.2d 358 (1955).

The following case involved the interpretation of a statute similar to Rule 32 of the Utah Rules of Civil Procedure: In *Ghezzi v. Holly,* 22 Mich. App. 157, 177 N.W.2d 247 (1970), the plaintiff named several doctors as defendants in a malpractice suit. Relying on a statute similar to Rule 32 of the Utah Rules of Civil Procedure, the trial court allowed the deposition of one co-defendant to be used against another co-defendant:

> "The trial court ruled that plaintiff's counsel could use Mulder's deposition for any purpose, including its use as substantive proof as against defendant Holly."

In reversing the trial court's decision, the Michigan Court stated:

> "Plaintiff also contends that the Mulder deposition was admissible in evidence against Holly by virtue of sub-section (2) of GCR 1963, 302.4. That sub-section provides:
>
> > "The deposition of a party * * * may be used by an adverse party for any purpose."
>
> "Plaintiff constructs the following argument. Mulder was a party to this litigation; plaintiff was an adverse party. Therefore, Mulder's statement concerning causation was admissible for any

purpose, i.e., as substantive evidence. Furthermore, Rule 302.4 provides that any part of a deposition may be used against any party who was present at the taking of the deposition. Plaintiff concludes that, since defendant Holly was present when Mulder was deposed, Mulder's statement can be used against Holly as substantive evidence. We disagree."

In its opinion the Court pointed out that the rule allows only the depositions of *adverse* parties to be admitted for "any purpose." It then went on to explain why special status is granted to such depositions:

> In *Genesee Merchants Bank & Trust Company v. Payne* (1967), 6 Mich. App. 204, 207, 148 N.W.2d 503, this Court explained the use of deposition testimony under sub-section (2) of Rule 302.4 as follows:
>
> > "The difference in the practices allowed in paragraphs (2) and (3) of the Rule is based on the distinction between the status of the deponent as a party *capable of making admissions affecting his cause,* or the party simply as a witness. Wigmore distinguishes the status of the deponent as well (5 Wigmore on Evidence (3d ed), Section 1416, p. 194):
> >
> > "The general rule that the witness must be shown unavailable for testifying in court does not apply to a party's use of his party opponent's deposition * * * for the simple reason that *every statement of an opponent may be used against him as an admission without calling him.* The opponent's sworn statement though called a deposition, is no less an admission than any other statement of his." (Emphasis supplied.)

> Sub-section (2), thus construed, is merely a restatement of the long recognized rule of evidence that statements of a party which are inconsistent with his claim in litigation are substantively admissible against that same party. Accord, *Community Counseling Service, Inc. v. Reilly,* (4 Cir. 1963), 317 F.2d 239, 243. See also, 4 Wigmore, Evidence (3d ed), Section 1048, p. 2; 4 Moore, Federal Practice (2d ed.), Section 26.29, p. 1963. "However, it is an equally well established rule of evidence that the admissions of one defendant are not admissible in evidence against a co-fendant.
>
> * * *
>
> "By definition, Mulder's statement at deposition constituted an admission. That admission, however, could only be used against Mulder. It could not be employed against defendant Holly. And although Mulder was a party at the time the deposition was offered in evidence, his statement regarding causation was not, thereby, admissible against Holly."

The rule, therefore, was not intended to allow new areas of discovery evidence to be superimposed into the trial record, but was merely a codification of the long established rule of evidence that admissions of an adverse party may be used as substantive evidence against him. It was never intended that the rule be used to allow the self serving statements of one co-defendant to be used to establish the liability of another co-defendant.

In light of the reasons behind the rule, it seems only logical that where deposition statements will have no adverse effect on the party making them, they are not

admissions and are inadmissible. Wigmore, supra, continues:

> "But this allowance of the use of a party's deposition as an admission presupposes that it is the party-*opponent's;* the deposition party's statements offered in his *own favor* are, of course, not admissions. . ."

In *Ghezzi v. Holly, supra,* the Michigan Court, relying on a provision similar to sub-section (a) of Rule 32 of the Utah Rules of Civil Procedure, stated:

> "An express provision of Rule 302.4 supports our conclusion. That provision is as follows:
>
> "At the trial * * * any part or all of a deposition, *so far as admissible under the rules of evidence,* may be used against any party who was present or represented at the taking of the deposition. * * *." (Emphasis supplied.)
>
> "Notwithstanding Holly's presence at the taking of Mulder's deposition, Mulder's response at deposition to plaintiff's hypothetical question could not be used against Holly at trial for the reason that, as to Holly, his response was inadmissible under the rules of evidence.
>
> "Two additional reasons lead us to conclude that subsection (2) provides no basis for the use of Mulder's deposition testimony concerning causation against defendant Holly. The first is the very rationale which forbids use of the admissions of one party against a co-party.
>
> "(O)rdinary fairness would forbid such a license; *for it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions.* It is plain, therefore, both on principle

and in policy, that the statements of a co-party (while usable of course against himself) are not usable as admissions against co-party."

> "Likewise, were we to accept the construction of subsection (2) urged by plaintiff, we would enable a party-plaintiff to discredit his opponent's claims merely by joining as co-defendant any person from whom plaintiff could obtain at deposition statements contrary to the position of the original defendant.

In *Glen Falls Insurance Co. v. Weiss,* 150 N.Y.S. 2d 685, 688 (1956), the New York Supreme Court stated:

> "For the depositions thus given could not be used by the plaintiff as against any of the other defendants. They could be used only as proof of the plaintiff's case in chief as against the specific adverse party examined, or as an admission against interest against that party, or in cross-examination of the party examined in the event he appeared as a witness upon the trial. A party examined before trial does not (where there are other parties defendant) become a general witness on all of the facts."

From the foregoing authorities, it is evident that the trial court's admission of the deposition testimony of Craig Kempton as evidence against Givan Ford was erroneous. Without such evidence there is nothing upon which the liability of appellant can be based. It is clear, therefore, that there was an erroneous admission which "probably had a substantial influence in bringing the verdict" (Rule 4, Utah Rules of Evidence) and the trial court's decision should be reversed.

POINT II.

ASSUMING ARGUENDO THAT THERE WAS NO IMPROPER ADMISSION OF EVIDENCE AND VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE RESPONDENT, THE EVIDENCE WAS STILL INSUFFICIENT TO SUSTAIN THE VERDICT.

Even though on appeal the evidence is viewed in the light most favorable to the respondent, in order for the verdict to stand on appeal, there must be a finding that the jury did not speculate and that its decision was based on substantial evidence. *Anderson v. Nixon,* 104 Utah 262, 139 P.2d 216 (1943).

The liability of Givan Ford was based solely on the theory of *respondeat superior.* In order to prevail under such a theory it is necessary that the plaintiff show that Mr. Kempton was pursuing his employer's business or doing an act reasonably incidental to his employment at the time the accident occurred. *Saltas v. Affleck, supra.*

A careful examination of the record reveals that there was no substantial evidence upon which the jury could have made such a finding.

Craig Kempton and Ernest Earl were the only witnesses whose testimony dealt with the question of the scope of Kempton's employment. Their testimony established the following uncontradicted facts:

Kempton was hired as a lot boy (R. 130, 215). His main duties were to keep the cars clean and start the cars each morning (R. 45, 215). He also was allowed to drive

the cars across the street to change their antifreeze and was frequently sent on errands. (R. 49, 216, 228). He did not have the authority to take a car from the premises on his own volition, but could only do so on the express directions of his supervisors or pursuant to a written work order. (R. 216, 223, 225). It was undisputed that at the time of the accident Kempton did not have permission to take the car, was not on an errand and was not changing antifreeze, but was driving the car for personal reasons. (R. 132, 133, 135, 217, 225).

To combat this uncontradicted evidence, the plaintiff offered no direct evidence showing that Kempton acted within the scope of his employment. Only by making some unwarranted inferences was he able to get the issue before the jury. By bringing out that Kempton had been told to "keep the cars running" it was inferred that Kempton had the implied authority to drive the cars on hiis own volition. (R. 46). However, Kempton and Earl both testified that "keep the cars running" meant that the cars were to be started and idled regularly and that if they wouldn't start, a mechanic was to be notified. (R. 106, 221). By demonstrating that Kempton was assigned a dealer's license plate it was inferred that he was free to take and drive cars on his own initiative. (R. 47). It was evident, however, that the plate was to be used when cars were taken on errands. (R. 228).

From the fact that Kempton was occasionally asked by salesmen how a particular car ran, it was inferred that he had the authority to test drive the cars. (R. 46). Kempton, however, admitted that he had no duties as

a mechanic or test driver and that his knowledge of the cars came through his driving them on errands and starting them each morning. (R. 46, 47, 50, 107, 130, 230).

Finally, plaintiff attempted to infer that because several salesmen had offered Kempton a finder's fee for bringing in customers, he somehow had the authority to test drive cars (R. 106, 107). However, Kempton and Earl both testified that Kempton had no duties as a salesman, that he was not under the direction of the salesmen, that he was instructed not to take orders from salesmen, that the finder's fee arrangement was entirely a private agreement between Kempton and the salesmen, and that Givan Ford was in no way involved. (R. 134, 135, 230, 233).

In determining whether there was sufficient evidence to support the jury's verdict, the reviewing court should not look at the evidence supporting the prevailing party's case in isolation, but should view it in relation to all of the attending circumstances and countervailing testimony. In *Continental Bank v. Stewart,* 4 U.2d 228, 291 P.2d 890, 892, (1955) the Court stated:

> "Defendant is correct in arguing that even though the testimony standing alone might be sufficient to support a finding, it must always be appraised in the light of all the attendant circumstances and countervailing testimony."

When the plaintiff's evidence in the present case is appraised in light of the overwhelming countervailing evidence, it is evident that there was not sufficient evi-

dence to support the jury's verdict. It was so clearly established by uncontroverted evidence that Kempton had departed from the scope of his employment that the question should never have been submitted to the jury.

The Utah case of *Saltas v. Affleck, supra,* is practically indistinguishable on its facts and presented this precise evidentiary question. In that case, the driver of a grocery delivery truck offered two girls a ride downtown. His manager had previously instructed him to take no passengers without permission. In doing so, he deviated from the prescribed route and negligently caused an intersection collision which resulted in the death of the plaintiff's son.

The trial court directed the jury to return a verdict in favor of the store owner which resulted in the appeal.

> "Appellant argues that the question of whether the agent was within the scope of his employment should be submitted to the jury.
>
> * * *
>
> "Here there was a departure from the course of the employment and the employer's responsibility for the acts of his employee had ceased. When the employee has clearly departed from the scope of his employment there is no question to be submitted to the jury. *Cannon v. Goodyear Tire & Rubber Co.,* 60 Utah 346, 208 P. 519; *Fowkes v. J. I. Case Threshing Machine Co.,* 46 Utah 502, 151 P. 53; *Wright v. Intermountain Motorcar Co.,* 53 Utah 176, 177 P. 237."

Not only is the verdict not supported by the evidence, but it also cannot be supported by a presumption

of agency arising from the fact that Givan Ford owned the automobile in question. In *Saltas v. Affleck, supra,* the Supreme Court pointed out that in Utah, as contrasted with the majority of jurisdictions, there is no presumption arising from the mere fact of vehicle ownership. See also *Galarowicz v. Ward,* 119 Utah 611, 230 P.2d 576 (1951), and *Fox v. Lavender,* 89 Utah 115, 56 P.2d 1049 (1936).

The Court ruled correctly that the evidence would not justify submission of liability upon the doctrine of ratification. *Jones v. Mutual Creamery Company,* 81 Utah 223, 17 P.2d 256 (1932).

CONCLUSION

Because there was insufficient evidence to support the verdict and because the trial court committed prejudicial error in admitting Craig Kempton's deposition testimony as evidence against appellant, the verdict and judgment against appellant should be set aside and a judgment of no cause of action should be entered as a matter of law.

Respectfully submitted,

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